FILED

961814 MAY 14 1997

OFFICE OF THE CLERK

No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF GLENDALE, DAVID RAMSAY, AND JOHN HOFFMAN,

Cross-Petitioners,

v.

LORRAINE LODER,

Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the California Supreme Court

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

SCOTT H. HOWARD
City Attorney
RON R. BRADEN
Senior Assistant City Attorney
613 East Broadway
Suite 200
Glendale, CA 91206
(818) 548-2080

CHARLES ROTHFELD*
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20016
(202) 778-0616

* *Counsel of Record*

14 pp

QUESTION PRESENTED

Whether a program requiring drug testing of municipal employees who have been conditionally approved for promotion is consistent with the Fourth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (I)
TABLE OF AUTHORITIES iii
JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED 1
STATEMENT 1
REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION 5
CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases

Chandler v. *Miller*, No. 96-126 (Apr. 15, 1997) 6, 7

Loder v. *City of Glendale*, No. 96-1614 ..... 1, 2, 5, 10

Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 5, 7, 8

Treasury Employees v. *Von Raab*, 489 U.S. 656 (1989) 3-6, 8, 9

Vernonia School Dist. 47J v. *Acton*, 115 S. Ct. 2386 (1995) 6, 7

Willner v. *Thornburgh*, 928 F.2d 1185 (D.C. Cir.), cert. denied, 502 U.S. 1020 (1991) 6

Statutes

28 U.S.C. § 1257 1

42 U.S.C. § 12112(d)(4(A) 9

42 U.S.C. §§ 12101-12213 9

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. B1-B150[1]) is reported at 59 Cal. Rptr. 696. The opinion of the California Court of Appeal (Pet. App. D1-D36) is reported at 47 Cal. App.4th 592. The decision of the California Superior Court (Pet. App. E1-E21) is not reported.

JURISDICTION

The judgment of the California Supreme Court was entered on January 6, 1997. A timely petition for a writ of certiorari was placed on this Court's docket on April 14, 1997. Pursuant to this Court's Rule 12.5, a conditional cross-petition is due on May 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This conditional cross-petition challenges a decision of the California Supreme Court that partially invalidated a program of the City of Glendale, California ("the City"), that requires drug testing of municipal employees who have been approved

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Loder* v. *City of Glendale*, No. 96-1614.

for promotion. The court upheld the testing program insofar as it requires drug testing of persons who have been newly hired by the City. While the legal principles governing the constitutionality of the drug testing program are settled, the court below misapplied those principles insofar as it partially invalidated the program. This Court accordingly should grant this cross-petition if the Court is also inclined to grant the pending petition in *Loder* v. *City of Glendale*, No. 96-1614, which challenges the aspect of the decision below that upheld the program as it applies to applicants for municipal employment.

1. Glendale's drug and alcohol screening program is described in the City's brief in opposition to the petition in No. 96-1614. In brief, the City has long required every applicant who has been conditionally approved for either hiring or promotion to undergo a preplacement medical examination conducted by a City-designated physician. Pet. App. B4. When the City detected signs of drug abuse among its workforce, it added a drug screening component to this medical examination. *Id.* at B3-B4. Pursuant to the screening program, persons approved for hiring or promotion are asked to list drugs or medications that they are taking, and then to produce a urine sample at a physician's office; a medical employee waits nearby but "does not visually observe the urination process." *Id.* at B6. If the drug test is positive and there is no legitimate medical explanation, the applicant is disqualified for hiring or promotion, although the test results are kept confidential and are not released to any law enforcement agency. *Id.* at B8.

Petitioner, a municipal taxpayer, brought this suit to challenge the constitutionality of Glendale's program under the Fourth Amendment. The California Supreme Court upheld the program insofar as it applies to applicants for employment. Pet. App. B51-B61. Balancing privacy concerns against the governmental interest served by the program, the court first noted "the well documented problems that are associated with the abuse of drugs and alcohol by employees." *Id.* at B53. The

court next court found that applicants for employment have minimal privacy interests "because the drug testing urinalysis in this case was administered as part of a preemployment medical examination that the job applicant, in any event, would have been required to undergo." *Id.* at B55. The court also reasoned that an employer has no opportunity to observe job applicants over a period of time and that the employer therefore "has a greater need for, and interest in, conducting suspicionless drug testing of job applicants than it does in conducting such testing of current employees." *Ibid.*

At the same time, however, the court, by a four-to-three vote, held that the drug testing program could *not* constitutionally be applied to all current employees who are seeking promotion. Pet. App. B45-B51. The majority concluded that an employer has a "greater need for, and interest in, conducting suspicionless drug testing of job *applicants* than it does in conducting similar testing of *current employees*" (*id.* at B53 (emphasis added)); the majority reasoned that "an employer generally need not resort to suspicionless drug testing to determine whether a current employee is likely to be absent from work or less productive or effective as a result of current drug or alcohol abuse." *Id.* at B54. The majority found support for this conclusion in *Treasury Employees* v. *Von Raab*, 489 U.S. 656 (1989), which it read to stand for the proposition that "it is not constitutionally permissible for a governmental employer to require urinalysis drug testing of *every* current governmental employee who applies for promotion to another governmental position — without regard to the nature of the position sought — but rather that the reasonableness of such testing turns on the nature and duties of the position in question." Pet. App. B50 (emphasis in original).

Having reached this conclusion, the majority decided not to "review all city jobs, position-by-position, to determine whether a suspicionless drug testing requirement constitutionally may be applied to an employee promoted to a particular position." Pet. App. B80. Instead, the majority "simply * * * set aside the

city's suspicionless urinalysis testing program as overbroad [insofar as it applied to candidates for promotion], leaving the city free to fashion a new prepromotional drug testing program in light of current constitutional and statutory authority." *Id.* at B82.

Justice Chin, joined by Justices Baxter and Brown, dissented from the court's invalidation of the prepromotional testing program. Pet. App. B122-B141. Justice Chin "fail[ed] to see any significant legal distinction between" applicants for employment and applicants for promotion (*id.* at B122):

> [t]he supposed privacy intrusions (indirect monitoring of urination and confidential questioning about current use of prescription drugs) are equally minimal, whether applied to new or conditionally promoted employees. The testing and medical inquiry is confidential, nonrandom, and relatively unintrusive, being performed during a comprehensive medical examination routinely given to *all* applicants for new employment or promotion.

Id. at B123 (emphasis in original). Justice Chin also noted that applicants for promotion, like applicants for employment, "have a reduced expectation of privacy regarding being tested for illegal drugs" because "all applicants (including those seeking promotion) have *advance notice* of the testing requirement." *Id.* at B128 (emphasis in original). On the other side of the balance, Justice Chin observed that the City "would appear to have a *far greater* interest in assuring that persons promoted to higher, more responsible City positions are drug free." *Id.* at B130 (emphasis in original).

Justice Chin also found no judicial authority supporting the invalidation of the testing program as it applied to applicants for promotion. He noted that "none of the applicable cases, federal or state, draws a distinction between newly hired and newly promoted employees for purposes of privacy analysis." Pet. App. B134. And he concluded that the majority misread *Von Raab*, noting that this Court's decision did not consider

"'whether the intrusion on privacy rises to [a significant] ... level when such drug testing is not administered as a separate procedure (as it was in *Skinner* [v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)] and *Von Raab*) but rather is conducted as part of a comprehensive medical examination that already includes a urinalysis component." *Id.* at B124 (citation omitted). Justice Chin therefore would have upheld the City's drug testing program in its entirety.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The petitioner in *Loder* v. *City of Glendale*, No. 96-1614, who is the plaintiff in this case, challenges the California Supreme Court's decision upholding the City's drug testing program insofar as it applies to applicants for *new employment*. We oppose that petition because the controlling legal principles are settled and there is no conflict or confusion on the point in the lower courts. If the Court nevertheless is inclined to review No. 96-1614, however, it should also grant this cross-petition so that it may address the California Supreme Court's invalidation of the testing program as it applies to applicants for *promotions*. Because the two aspects of the holding below are closely related, granting both the petition and the cross-petition would allow the Court the engage in a more comprehensive and nuanced exploration of the questions presented. In addition, review of the cross-petition would be appropriate because the California Supreme Court's partial invalidation of the testing program turned on a misapplication of the controlling principles and a misunderstanding of this Court's decision in *Von Raab*. Because the issue presented here is of substantial practical importance to governmental employers in California, the Court accordingly should grant review of the cross-petition if certiorari is granted in No. 96-1614.

1. As the majority below properly recognized (Pet. App. B43), the validity of a drug testing program turns on "balanc[ing] the individual's privacy expectations against the

Government's interest to determine whether it is important to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-666. But the majority went astray in its assessment of "the competing private and public interests advanced by the parties." *Chandler* v. *Miller*, No. 96-126 (Apr. 15, 1997), slip op. 7. Indeed, as Justice Chin explained, the majority's error is apparent from the tension between the two elements of its holding: for Fourth Amendment purposes, there is no meaningful distinction between the program's impact on applicants for employment on the one hand, and on applicants for promotion on the other.

At the outset, it is plain that the testing program has only a minimal impact on the privacy interests of applicants for promotion. This Court already has indicated that the intrusion worked by programs such as the one in this case is "negligible" (*Vernonia School Dist. 47J* v. *Acton*, 115 S. Ct. 2386, 2393 (1995)) and "not significant." *Id.* at 2394. In addition, applicants for promotion "became subject to drug testing only because they chose to apply for promotions" and therefore "had control over whether they would be tested and they had advance knowledge of the testing," considerations that "served to diminish their expectation of privacy." *Willner* v. *Thornburgh*, 928 F.2d 1185, 1190 (D.C. Cir.), cert. denied, 502 U.S. 1020 (1991). See *Von Raab*, 489 U.S. at 672 n.2. And that expectation is further diminished because the drug test is performed during a comprehensive medical examination that is required of all employees who are given promotions. See Pet. App. B123 (opinion of Chin, J.). These same factors led the majority below to find that the privacy interests of newly hired employees are not significantly affected by Glendale's program. See *id.* at B55-B58.

On the other side of the equation, the majority itself noted the "well documented" harms caused by employee drug use, which include "increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover." Pet. App.

B53. These considerations surely apply to candidates for promotion as well as to applicants for employment; indeed, they apply with special force to employees who have been selected for promotion to more responsible City positions. See *id.* at B130 (opinion of Chin, J.). And these dangers were not theoretical: the City had concrete evidence of a growing drug abuse problem among municipal employees (see *id.* at B3), a consideration that "bolster[s] the argument that drug testing programs were warranted and appropriate." *Chandler*, slip op. 13. Again, then, the situation of candidates for promotion cannot be meaningfully distinguished from that of job applicants.

2. In fact, the majority below identified only a single distinction between candidates for employment and those for promotion: it opined that the City would have an opportunity to observe the performance of current employees before they were promoted, and therefore "need not resort to suspicionless drug testing" to determine whether they were impaired by drug abuse. Pet. App. B54. But this reasoning is flawed on several levels. For one thing, as Justice Chin observed, "[a]n untested, drug abusing employee who is satisfactorily 'getting by' at a lower level job may well prove totally inadequate at a new position involving additional skills or responsibilities." *Id.* at B132. In addition, as this Court has explained, the empirical assumption underlying the majority's conclusion is insupportable, for drug-impaired employees "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'" *Skinner*, 489 U.S. 628 (citation omitted).

Perhaps more fundamentally, the majority's suggestion that there is an alternative means of detecting drug use is simply beside the point. This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Vernonia*, 115 S. Ct. at 2396. "It is obvious that '[t]he logic of such absolute less-restrictive-alternative arguments could raise insuperable barriers

to the exercise of virtually all search-and-seizure powers,' * * * because judges engaged in a *post hoc* evaluation of government conduct can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished." *Skinner*, 489 U.S. at 629 n.9 (citation and internal quotation marks omitted). The alternative imagined by the majority below — observing current employees for drug use before they are promoted — accordingly cannot serve to invalidate the City's testing program.

3. Finally, the majority's invalidation of Glendale's program insofar as it applies to applicants for promotion finds no support in the decisions of other courts. While the majority noted decisions that addressed *random, unannounced drug testing* of incumbent employees (Pet. App. B50), Justice Chin properly concluded that those holdings are "not directly apposite to our situation." *Id.* at B134. As we have explained, under the Glendale program persons become subject to testing only when they apply for promotions, and they are given advance notice of the tests; both of these factors serve to diminish privacy interests. But neither factor is present when an employer *randomly* tests employees who are *not* applicants for promotion.

The majority below also was incorrect in relying on *Von Raab*. That case involved a drug testing program for certain categories of Customs Service employees who were seeking transfer or promotion; because the Court remanded the case for additional factfinding regarding particular categories of employees (see 489 U.S. at 677-678), the majority below concluded that a blanket testing program that covers all City personnel selected for promotion is impermissible. This conclusion, however, rests on a misreading of *Von Raab*. The Court there specifically noted that employees who already were subject to "medical examinations" would have "diminish[ed] * * * expectations of privacy in respect of a urinalysis test" — and the Court, in remanding the case, directed the court of appeals to "consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to

which these employees already were subject." 489 U.S. at 678, 679. Because City employees in this case already are subject to medical examinations and accordingly have diminished expectations of privacy, nothing in *Von Raab* invalidates Glendale's testing program.[2]

---

[2] In holding that the City should reevaluate the categories of employees subject to the drug testing program, the majority below was influenced by its view that the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, precludes employers from requiring medical examinations for current employees who seek promotions. Pet. App. B81-B82. We doubt the validity of this conclusion; as Justice Chin noted (*id.* at B125-B126), the ADA permits examinations that are "job-related and consistent with business necessity" (42 U.S.C. § 12112(d)(4(A)), which appears to describe the medical exams required by the City. In any event, as the majority itself recognized (Pet. App. B59 n.18; see *id.* at B125 (opinion of Chin, J.)), the plaintiff did not raise an ADA challenge to the City's policy of requiring medical examinations for conditionally promoted employees. And the meaning of the ADA has no direct bearing on the constitutional issue presented in this cross-petition.

CONCLUSION

If the petition for a writ of certiorari in *Loder* v. *City of Glendale*, No. 96-1614, is granted, the conditional cross-petition for a writ of certiorari should be granted as well.

Respectfully submitted.

SCOTT H. HOWARD
City Attorney
RON R. BRADEN
Senior Assistant City Attorney
613 East Broadway
Suite 200
Glendale, CA 91206
(818) 548-2080

CHARLES ROTHFELD*
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20016
(202) 778-0616

* *Counsel of Record*

MAY 1997

Supreme Court, U.S.
FILED

No. 96-6148 14 JUN 9 1997

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1996

LORRAINE LODER,

Petitioner,

vs.

CITY OF GLENDALE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S CROSS-PETITION FOR WRIT OF CERTIORARI

MARVIN E. KRAKOW
Counsel of Record
STEVEN J. KAPLAN
KRAKOW & KAPLAN
1801 Century Park East
Suite 1520
Los Angeles, California 90067
(310) 229-0900

MARK D. ROSENBAUM
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Attorneys for Petitioner
LORRAINE LODER

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

No. 96-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LORRAINE LODER,

Petitioner,

vs.

CITY OF GLENDALE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S CROSS-PETITION FOR WRIT OF CERTIORARI

MARVIN E. KRAKOW
Counsel of Record
STEVEN J. KAPLAN
KRAKOW & KAPLAN
1801 Century Park East
Suite 1520
Los Angeles, California 90067
(310) 229-0900

MARK D. ROSENBAUM
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Attorneys for Petitioner
LORRAINE LODER

PETITIONER'S OPPOSITION BRIEF TO RESPONDENT'S CROSS-PETITION FOR CERTIORARI

I. THE CALIFORNIA SUPREME COURT'S HOLDING THAT GLENDALE'S SUSPICIONLESS PRE-PROMOTIONAL DRUG TESTING VIOLATES THE FOURTH AMENDMENT IS CONSISTENT WITH THE DECISIONS OF THIS COURT IN *TREASURY EMPLOYEES v. VON RAAB* AND *CHANDLER v. MILLER*.

The California Supreme Court considered the application of Fourth Amendment cases to Glendale's drug testing program before addressing state constitutional issues, because this Court had clearly spoken in the area and the California Constitutional provisions had not been specifically applied to workplace drug testing. (Appendix B-25, B-26) In dealing with testing of promotional applicants (the subject of Respondent's Cross-Petition for Certiorari), the California Supreme Court plurality followed *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). It properly held that across the board suspicionless testing of promotional applicants violated the Fourth Amendment. It is clear from this Court's recent holding in *Chandler v. Miller*, No. 96-126 (April 15, 1996) that the city's promotional testing program could not be sustained.

Cross-Petitioner's efforts to characterize the drug testing it does as part of a routine physical exam is not supported by the record. (App. B-87 - B-91) The drug testing program requires disclosure of an array of medical and personal information which are simply not part of a routine physical prior to employment, let alone part of a physical which might be required for promotion.

The California Supreme Court's remedy for the overbreadth of the Fourth Amendment intrusion on current employees was clearly consistent with this Court's teaching in *Chandler v. Miller, supra*, that when the government would engage in suspicionless testing, it must undertake a careful analysis of the factual circumstances of specific jobs. (App. B-51, note 12; B-80 - B-82) The Court properly invalidated the current program as overbroad, while leaving Respondent City of Glendale free to fashion a more limited promotional testing program consistent with the Fourth Amendment.

II. RESPONDENT IMPROPERLY SEEKS REVIEW OF THE STATE COURT'S RESOLUTION OF FACTUAL ISSUES.

Respondent's complaint boils down to an assertion that the California Supreme Court improperly weighed evidence of and resolved factual disputes concerning the drug testing program's intrusion on

current employees and the city's need to test promotional candidates. (Conditional Cross-Petition, 5-7) Ordinarily, such concerns are not the basis for certiorari. Rule 10, Rules of the Supreme Court.

III. THE CALIFORNIA SUPREME COURT'S DECISION RESTS ON INDEPENDENT STATE GROUNDS.

The California Supreme Court plurality based its decision with respect to promotional testing on the Fourth Amendment. It did not explicitly use the California Constitutional right to privacy to invalidate that part of Glendale's drug testing program. However, the plurality also explicitly stated that the state constitutional right to privacy was enacted to provide, and has been consistently interpreted to provide, no less protection than that provided by the Fourth Amendment. (App. B-70, B-71) Justice Mosk's concurring opinion specifically relied on the right to privacy provided by the California state constitution. (App. B-85, B-109 - B-114) Thus, the California Supreme Court's holding with respect to promotional testing can be understood as based on both state and federal constitutional considerations. For that reason alone, it would be imprudent and unnecessary to consider the promotional testing issues raised by Respondent's Cross-Petition.

IV. CONCLUSION

The Conditional Cross-Petition For Certiorari should be denied.

Dated: June 6, 1997

Respectfully submitted,

KRAKOW & KAPLAN
MARVIN E. KRAKOW
STEVEN J. KAPLAN
1801 Century Park East,
Suite 1520
Los Angeles, CA 90067

ACLU OF SOUTHERN
CALIFORNIA
MARK ROSENBAUM
1616 Beverly Blvd.
Los Angeles, CA 90026

Attorneys For Petitioner